
(1961) 07 MAD CK 0023
In the Madras High Court

Late O.A.O.K. RM. Arunachalam Chettiar represented by
O.A.O.K. RM. AR. Ramaswami

APPELLANT

Vs

The Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-07-1961

Acts Referred:

Income Tax Act, 1961 — Section 30, 30(3), 66(2)

Citation : (1962) ILR (Mad) 165 : (1962) 1 MLJ 158

Hon'ble Judges : S. Ramachandra Iyer, O.C.J.

Bench : Single Bench

Judgement

S. Ramachandra Iyer, Offg. C.J.

1. The estate of late O.A.O.K. RM. Arunachalam Chettiar (who died on 20th November, 1952) in the hands of his legal representative was assessed to tax for the period from 1st April, 1952 to 20th November, 1952, by the Income Tax Officer, Karaikudi, on 30th March, 1954. Notice of demand of tax due was served on the assessee on 22nd April, 1954. The assessee filed an appeal against the order of assessment before the Appellate Assistant Commissioner on 20th May, 1954. Unfortunately, the appeal petition was not accompanied by the notice of demand, though it was otherwise in order. On the same day, the Appellate Assistant Commissioner returned the petition to the assessee for supplying the defect, viz., filing the notice of demand. He also stated:

petitioner may, if so advised, re-submit the petition after rectifying the defects.

The assessee re-presented the appeal with the demand notice on 24th May, 1954. If that date is taken as the date of presentation of the appeal, it would be barred by limitation by three days. The assessee's case was that the appeal should be deemed to have been presented on 20th May, 1954 itself and that there was really no delay in such presentation. This was not accepted by the Appellate Assistant Commissioner who declined to admit the appeal. This order was the subject-matter of an appeal to the Income Tax Appellate Tribunal which

regarded the order of the Appellate Assistant Commissioner as one involving the exercise of discretion in the matter of excusing the delay in presentation of the appeal, and, holding that there was no reason to interfere with such discretion dismissed the appeal. The Tribunal did not consider the question whether at all there was a delay in presentation of the appeal. In the application u/s 66(2) of the Income Tax Act to this Court, the assessee complained that his substantial case, namely, that there was no delay in the presentation of the appeal, had not been considered by the Appellate Tribunal. An affidavit was also filed in support of the application by the Advocate who appeared before the Tribunal stating that he argued the question that the date of the presentation of the appeal should, in the circumstances, be taken to be 20th May, 1954. This Court, by its order, dated 10th August, 1956, called for the remarks of the Tribunal on the allegations contained in the affidavit of counsel. In their report, dated 24th September, 1956, the Tribunal, after adverting to certain matters, stated:

It is the recollection of the members who heard the aforesaid appeal that Sri Venkataraman argued seriously only the contention which had been dealt with in the order u/s 33; but it is not unlikely or improbable that he could have also, in the course of his arguments, referred to the other contention, as he now avers to have, in the affidavit under reference.

2. It was on the view that a point argued before the Tribunal was not considered by it that this Court thereupon directed a statement of the case by the Tribunal on the following question:

Whether on the facts and in the circumstances of the case the appeal filed by the applicant before the Appellate Assistant Commissioner, dated 20th May, 1954 and re-presented on 25th May, 1954, was barred by limitation?

3. The substantial question for consideration is whether the presentation of the appeal on 20th May, 1954, was invalid, as in that case it could be deemed to be presented only on 24th May, 1954.

4. Section 30 of the Income Tax Act confers a right of appeal from an order of assessment made by the Income Tax Officer to the Appellate Assistant Commissioner. Sub-section (3) thereof states:

The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

Rule 21 of the Income Tax Rules provides that an appeal u/s 30 against an order of assessment shall be in Form B contained therein. Form B contains six paragraphs; at the end of which the assessee is to sign and verify his signature. Paragraph 2 of the Form states:

notice of demand order u/s 23(6)

The intimation of the amount of loss attached hereto, Intimation of the orders of refund was served upon your petitioner on....

The note to the Form states that inappropriate words should be deleted. There is no provision either in Section 30 or in the Income Tax Rules which makes it mandatory for the assessee to annex as an enclosure to his appeal petition, the notice of demand. Rule 2, no doubt, contemplates such an enclosure. This is in contrast to Rule 10 of the Appellate Tribunal Rules, which prescribes that every memorandum of appeal shall be accompanied by two copies (at least one of which should be a certified copy) of the order appealed against and two copies of the order of the Income Tax Officer. Sub-clause (2) of the rule confers the power on the Tribunal to accept a memorandum of appeal which is not accompanied by the documents referred to in Sub-rule (1). But there is no rule like Rule 10(1) of the Appellate Tribunal Rules for appeals filed against the order of the Income Tax Officer to the Appellate Assistant Commissioner u/s 30.

5. It is however contended that paragraph 2 of Form B, which has been prescribed as the form for the appeal, should be held to imply that the notice of demand should always accompany the appeal petition. A reference to Form B itself will show that a distinction is made between essential matters and matters not essential. The note to the rule says that the form of appeal and the form of verification shall be signed by the assessee in the manner specified therein. That is obviously having regard to Section 30(3), a mandatory provision. There are other provisions like those contained in Rule 3, which requires inter alia that the tax on the income should be specified. The rule states that the tax or the refund need not be entered by the appellant, if the grounds of appeal indicate clearly the objections to the tax or the refund, as the case may be, determined by the Income Tax Officer. From this, it is clear that Rule 21 does not contemplate that every detail required in the Form should be given. Rule 2 itself is subject to the Note that inappropriate words can be deleted. It follows that, where an assessee is not in possession of the demand notice, he can strike out the words "Notice of demand attached hereto". To hold otherwise will lead to inconvenient and unjust results. Suppose a notice of demand served on an assessee was lost by, or stolen from, the assessee. It cannot be stated that, unless he is able to produce the notice of demand, no appeal could lie. In our opinion the proper way to interpret Form B to Rule 21 is that where the rule mandatorily requires certain things to be done, an omission to comply with any such direction would amount to an improper presentation of the appeal. For example, Form B read with Section 30(3) requires that the appeal should be signed and verified personally by the appellant. The appeal would obviously be invalid if the memorandum is unsigned or not verified, or, it is signed and verified by a person not entitled to do so. But the same principle cannot apply to the unessential requirements in the Form.

6. In *Maharani Gyan Manjari Kuari v. Commissioner of Income Tax* (1944) ITR 59, it was held that an assessee could not be expected to do the impossible thing in the way of compliance with the prescribed requirements, and where the assessee contended that he never received a demand notice and could not attach it to the memorandum of appeal, the Appellate Assistant Commissioner should investigate into the truth of the averment and without doing so he would not be

entitled to refuse to entertain the appeal on the ground that the prescribed form had not been duly complied with. This decision supports the view that in a proper case an appeal could be entertained without the demand notice being filed with it in other words the demand notice is not an essential requirement for the presentation of the appeal. It is no doubt true that there is no provision in the Act requiring the Appellate Assistant Commissioner to call upon the appellant to rectify the mistakes in presentation of an appeal. But such power should be held to be inherent where the mistake is not a vital one. For example, if an appeal petition contains a number of spelling and grammatical mistakes, it cannot be said that the Appellate Assistant Commissioner has no power to call upon the assessee to rectify such mistakes, and that the only alternative would be to dismiss the appeal petition on that ground. A right of appeal is a statutory one, and, unless there is anything explicit in the statute or the rules made thereunder, such right cannot be restricted. There being no provision either in the Income Tax Act, or in the rules made thereunder, making it obligatory on the assessee to file the notice of demand along with the appeal u/s 30, it cannot be held that an omission to file such notice along with the appeal was a fatal defect to the presentation thereof. Paragraph 2 of Form B to Rule 21, no doubt, impliedly contemplates an enclosure of the notice of demand. The object of that paragraph is only to facilitate the Appellate Assistant Commissioner to find out whether the appeal is in time or not. That can always be found by the Appellate Assistant Commissioner from the records available with the Income Tax Officer. In such cases, it will no doubt be open to the Appellate Assistant Commissioner to call upon the assessee to produce the notice of demand, but if the assessee is unable to do so, he should see whether there is justifiable reason for it. The non-production of the demand notice with the appeal petition is a mere irregularity which can either be dispensed with or rectified subsequently. The irregularity in the presentation of the appeal on 20th May, 1954, in the instant case did not amount to a substantial non-compliance of the Act or the rules, and as the defect pointed out by the Appellate Assistant Commissioner had been rectified subsequently the original presentation should be deemed to be a proper one; the appeal was in time. We answer the question referred to us in the negative and in favour of the assessee.

7. The assessee will be entitled to his costs. Advocate's fee: Rs. 250.